

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 29, 2009

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUN 29 PM 4:06
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

**Re: SOAH Docket No. 582-09-1252; TCEQ Docket No. 2008-0709-MLM-E;
In the Matter of an Enforcement Action Against James Jones; RN105480875**

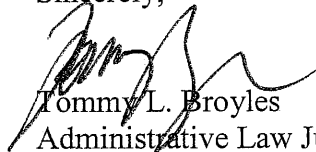
Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 20, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than July 30, 2009.

This matter has been designated **TCEQ Docket No. 2008-0709-MLM-E; SOAH Docket No. 582-09-1252**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an original and seven copies shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Tommy L. Broyles
Administrative Law Judge

TLB/lb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: JAMES JONES

SOAH DOCKET NUMBER: 582-09-1252

REFERRING AGENCY CASE: 2008-0709-MLM-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ TOMMY L. BROYLES**

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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JAMES JONES

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-1252
TCEQ DOCKET NO. 2008-0709-MLM-E

2009 JUN 29 PM 4:06

IN THE MATTER OF
AN ENFORCEMENT ACTION
AGAINST JAMES JONES;
RN105480875

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess two thousand, two hundred fifty-seven dollars (\$2,257.00) in administrative penalties against, and require certain corrective actions by, James Jones (Respondent) for violations of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE §§ 111.201 and 330.15(a)(1)(c). Respondent owns real property located at 920 East Main Street, Denison, Grayson County, Texas (the Facility). The ED alleges that Respondent failed to prevent the unauthorized disposal of municipal solid waste (MSW) and failed to prevent outdoor burning from being conducted on his property. As set out below, the Administrative Law Judge (ALJ) recommends that the Commission assess a penalty of \$2,257.00 against, and require certain corrective actions by, Respondent.

II. JURISDICTION

Respondent does not dispute the Commission's jurisdiction, so no further discussion regarding notice or jurisdiction is included here. The attached Proposed Order contains the required Findings of Fact and Conclusions of Law.

III. PROCEDURAL HISTORY

On January 8, 2009, a preliminary hearing was held with Respondent and the ED appearing. The ALJ issued Order No. 1 on January 16, 2009, memorializing the preliminary hearing and setting the hearing on the merits for the time, date, and place agreed to by the parties. On May 1, 2009, the ALJ convened the hearing on the merits. The ED appeared and was represented by Xavier Guerra, staff attorney. Respondent appeared and represented himself. The record was closed that same day.

IV. APPLICABLE LAW

The ED alleges that Respondent violated the Texas Health & Safety Code and several provisions of the Commission's rules by storing and processing unauthorized MSW and also by burning material on his property without authorization to do so. The Texas Health & Safety Code states that a person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of any Commission rule or order.¹ In regard to burning, the Commission's rules state:

No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the Commission. Outdoor disposal or deposition of any material capable of igniting spontaneously, with the exception of the storage of solid fossil fuels, shall not be allowed without written permission of the Executive Director. . . .²

The Commission's rules address the collection of MSW at 30 TEX. ADMIN. CODE §330.15:

- (a) A person may not cause, suffer, allow or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste, or to extract

¹ TEX. HEALTH & SAFETY CODE § 382.085(b).

² 30 TEX. ADMIN. CODE § 111.201.

materials under Texas Health & Safety Code § 361.092, in violation of the Texas Health & Safety Code, or any regulations, rules, permit, license, order of the Commission, or in such a manner that causes: (1) the discharge or imminent threat of discharge of MSW into or adjacent to the waters in the state without obtaining specific authorization for the discharge from the Commission.

- (c) Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the Commission.

V. EVIDENCE

The ED alleges that Respondent failed to prevent the unauthorized disposal of municipal solid waste (MSW) and failed to prevent outdoor burning from being conducted on his property. Erin Tanski Gorman, environmental investigator for the TCEQ's Dallas-Fort Worth regional office, conducted an investigation of the alleged MSW facility (Facility) on February 25, 2008.³ When Ms. Gorman arrived, Respondent was separating wood and metal materials into piles. Respondent advised that he was separating the wood for burning, so Ms. Gorman informed him that the burning of wood, other than brush from his own property, was prohibited. Ms. Gorman also observed piles of soil, concrete, rock, and bricks with various wastes mixed in. The wastes included asbestos siding and floor tiles, shingles, asphalt, treated wood, metal wiring, cardboard, rebar and telephone poles. From these observations, Ms. Gorman concluded that Respondent was accepting unauthorized MSW at the facility and warned him that asbestos had to be separated and disposed of properly in an authorized landfill.⁴

After reviewing Ms. Gorman's report and looking at photographs of the Facility, Michael Mayer, TCEQ Enforcement Coordinator, estimated that Respondent had approximately 1,000 cubic yards of waste at the Facility. Mr. Mayer testified that Respondent was allowing the

³ Her findings were documented in an investigative report. Exhibit No. ED-1, TCEQ Investigation Report.

⁴ Also during her investigation, Ms. Gorman noted that on the east side of the Facility, wet concrete had been dumped near the bank of Pawpaw creek. Some of the concrete extended into the creek and altered the creek's flow. However, Respondent offered evidence that he has corrected this potential violation and the ED did not seek any related penalties.

unauthorized dumping of MSW on the property and that a base penalty of \$1,000.00 is appropriate for the violation.⁵

Turning to the second alleged violation, Jim White, Sr., Grayson County Environmental Protection Officer, testified that on December 13, 2007, he received a call from the Grayson County Fire Department informing him that Respondent was requesting authorization to conduct a burn on his property.⁶ Officer White told the fire department to deny Respondent's request, as meteorological conditions were unfavorable. However, it was later discovered that Respondent had already begun the burn, without waiting for approval. The Denison Fire Department was subsequently called out to the Facility to extinguish the fire. Photographs taken that day by the fire department depict treated wood and other demolition materials being burned.

Amy Pritchett, TCEQ Investigator, was asked to review the photographs and reports concerning the December 13, 2007 burn to determine if violations of the Commission's rules had taken place. Ms. Pritchett determined that Respondent had violated 30 TEX. ADMIN. CODE §111.201 by failing to prevent unauthorized material from being burned on his property.⁷ Mr. Mayer also reviewed the photographs and reports and testified that a base penalty of \$1,000.00 is appropriate for this violation.⁸ Further, Mr. Mayer estimated that Respondent's illegal burn saved him \$257.00 in disposal fees and recommended that this amount be added to the base penalty, for a total fine relating to the December 13, 2007 burn of \$1,257.00. Mr. Mayer testified that in total, the ED seeks \$2,257.00 in penalties from Respondent for the two violations.

Respondent argued that he has removed all unauthorized materials from the Facility and cleaned up the site. He offered several pictures as proof.⁹ He also submitted a letter from the Department of the Army, Corps of Engineers, confirming his removal of the cement in the creek,

⁵ See Exhibit No. ED-11.

⁶ Mr. White has monitored the Facility for some time and appeared during the hearing to be familiar with Respondent.

⁷ See Exhibit No. ED-4, TCEQ Investigation Report.

⁸ See Exhibit No. ED-11.

⁹ See Respondent Exhibit No. 1, pictures labeled A-K.

restoring its natural flow.¹⁰ He contested Staff's allegation that he "knowingly" committed any of the violations at issue. Rather, he suggested that he misunderstood the MSW guidelines and what he could and could not accept. He argued that his property was not a dump for MSW but was instead a recycling center.

Respondent challenged the determinations made by Ms. Gorman and Ms. Pritchett, arguing that the materials he burned was raw cedar and not treated lumber. Respondent referred to one picture in particular, which depicted a piece of lumber that had linear discolorations.¹¹ Respondent argued that what Staff alleged was treated lumber was actually an old floor board from a trailer and that the linear markings were a result of the metal crossbars holding the floorboards together.

Respondent requested leniency in assessing any fine because of his misinformation. Respondent further argued that if he had been violating the TCEQ rules for the length of time Mr. White suggested, then TCEQ should have given him a ticket long before now.

VI. ALJ'S RECOMMENDATION

The evidence and testimony indicates that Respondent was aware of the Commission's rules but chose not to abide by them concerning MSW and outdoor burning. Officer White had repeatedly informed Respondent that he was violating the rules by accepting and disposing of MSW. The evidence suggests that Respondent even violated his stated understanding of the rules concerning burning (that he could only burn things grown on his land.) The pictures and testimony establish that treated wood was burned. Similarly, Respondent knew enough to seek approval from authorities when he wanted to conduct an outdoor burn, but went ahead and conducted the burn without approval.

The Commission is authorized to assess an administrative penalty against a person who violates provisions of the Texas Water Code within the Commission's jurisdiction or a rule

¹⁰ See Respondent's Exhibit No. 2.

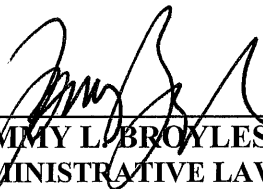
¹¹ See Staff Exhibit No. ED-13, Denison Fire Dept. picture 4 of 10.

adopted by the Commission or an order or permit issued thereunder. As pertinent to this case, the penalty may not exceed \$10,000 per day of violation.¹² Additionally, the Commission may order the violator to take corrective action.¹³ The ALJ finds that the administrative penalty recommended by Staff is warranted on the grounds that Respondent violated the environmental laws and regulations as noted above. The ED appropriately considered the factors set forth in TEX. WATER CODE ANN. §§ 7.053 and 13.4151 and followed the Commission's Penalty Policy in calculating the total proposed penalty in the amount of \$2,257.00. This amount is reasonable, and even lenient, as the ED sought penalties for only two violations when each day of the illegal acceptance of MSW at the Facility could have been included as separate violations.

VII. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Proposed Order concluding that the alleged violations occurred, assessing an administrative penalty of \$2,257.00 against Respondent for the violations alleged and established in this proceeding, and requiring corrective action by Respondent.

SIGNED June 29, 2009.



TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹² TEX. WATER CODE ANN. § 7.054(c).

¹³ TEX. WATER CODE ANN. § 7.073.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
and Requiring Corrective Action By**

JAMES JONES

TCEQ DOCKET NO. 2008-0709-MLM-E

SOAH DOCKET NO. 582-09-1252

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by James Jones (Respondent). Tommy L. Broyles, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on May 1, 2009, in Austin, Texas, and presented the Proposal for Decision.

The parties to the proceeding are Respondent; the Commission's Executive Director (ED), represented by Xavier Guerra, attorney in TCEQ's Litigation Division; and the Office of Public Interest Counsel. After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Respondent owns real property used for an unauthorized landfill located at 920 East Main Street, Grayson County, Texas. The site rests on three parcels of land owned by Respondent and consists of approximately ten acres (the Facility) that border Pawpaw Creek.
2. On December 13, 2007, Respondent was responsible for an unauthorized outdoor burn at the Facility. As a result of the burn, the Denison Fire Department was called to the Facility to extinguish the fire.

3. On February 25, 2008, approximately 1,000 cubic yards of municipal solid waste (MSW) had been disposed of at the Facility, including asbestos siding and floor tiles, shingles, asphalt, treated wood, and telephone poles.
4. The burn did not meet an exception to the prohibition on outdoor burning.
5. On March 31, 2008, the TCEQ issued a Notice of Enforcement for Compliance Evaluation Investigation to Respondent.
6. On August 21, 2008, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated 30 TEX. ADMIN. CODE §§ 330.15(a)(1) and (c) by failing to prevent the disposal of MSW at an unauthorized site. The ED also alleged that Respondent violated 30 TEX. ADMIN. CODE § 111.201 and TEX. HEALTH & SAFETY CODE § 382.085(b) by failing to prevent outdoor burning from being conducted on his property.
7. The ED recommended the imposition of an administrative penalty in the amount of \$2,257.00, and corrective action to bring the site into compliance.
8. Respondent has removed concrete that was impeding PawPaw Creek, one of the corrective actions recommended by the ED.
10. The proposed penalty is the base penalty of \$1,000.00 for each violation, plus \$257.00 in avoided costs for the unauthorized outdoor burning.
11. An administrative penalty of \$2,257.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission's 2002 Penalty Policy.
12. On September 15, 2008, Respondent requested a contested case hearing on the allegations in the EDPRP.
13. On November 18, 2008, the case was referred to SOAH for a hearing.

14. On November 25, 2008, the Commission's Chief Clerk issued a notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
15. At the preliminary hearing that was held on January 8, 2009, the ED established jurisdiction to proceed.
16. The hearing on the merits was conducted on May 1, 2009, in Austin, Texas, by ALJ Tommy L. Broyles.
17. The ALJ issued the Proposal for Decision on June 30, 2009.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code , the Texas Health & Safety Code, or any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
4. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
5. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.

6. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE §§ 111.201 and 330.15(a)(1) and (c), and TEX. HEALTH & SAFETY CODE § 382.085(b).
9. In determining the amount of an administrative penalty, the ED considered several factors, as required by TEX. WATER CODE ANN. § 7.053, including:
 - The impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$1,000.00 is justified and should be assessed against Respondent.

12. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. James Jones is assessed an administrative penalty in the amount of \$2,257.00 for violations of 30 TEX. ADMIN. CODE §§ 111.201 and 330.15(a)(1) and (c), and TEX. HEALTH & SAFETY CODE § 382.085(b). The payment of this administrative penalty and Mr. Jones' compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: James Jones; Docket No. 2008-0709-MLM-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Immediately upon the effective date of this Order, Mr. Jones shall cease to cause, suffer, allow, or permit any additional municipal solid waste to be stored, processed, or disposed of at the Facility.
3. Within 30 days after the effective date of the Commission Order, Mr. Jones shall develop and implement procedures to prevent the recurrence of outdoor burning at the Facility.

4. Within 60 days after the effective date of the Commission Order, Mr. Jones shall remove and properly dispose of all MSW at the Facility.
5. Within 75 days after the effective date of the Commission Order, Mr. Jones shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with the above ordering provisions. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Mr. Sam Barrett, Waste Section Manager
Texas Commission on Environmental Quality
Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 6118-6951

6. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

7. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
8. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
9. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
10. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission